Ricardo G Tapel v Polar Twin Advance (M) Sdn Bhd (Nicholas Lee Zse Young & Anor, third parties)

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-171 OF 2011
VARGHESE GEORGE J
20 NOVEMBER 2012

Contract — Loan — Friendly loan — Whether burden to prove personal loans discharged — Authority to take loans — Whether transaction could be ratified or regularised even if invalid — Recovery of sums advanced — Contracts Act 1950 s 71

In the present claim, the plaintiff claimed that he had, on several occasions, given personal loans to the defendant. The defendant denied such allegations and contended that, if at all the loans were made at the request of the defendant's director ('SY Lee'), the SY Lee had no authority to incur any debt which exceeded RM200,000 without prior unanimous approval of the defendant's board of directors ('the board'). The defendant further alleged that the loan, if taken by the defendant, was for 'NeoMeridian Sdn Bhd' ('NeoMeridian') and the plaintiff's funds had been merely channeled through the defendant to render the defendant liable instead of NeoMeridian. The defendant sought to be indemnified by the estate of SY Lee through a third party proceeding should there be a judgment entered against the defendant in the action. In respect of the alleged transaction by the plaintiff, the defendant submitted that SY Lee was in breach of his permitted authority and/or of his duty including fiduciary duty, to act honestly, in good faith, in fidelity and/or had acted in a position of conflict of interest to that of the defendant. The issues that arose in the present claim were: whether the plaintiff had discharged the burden on them that, at the defendant's request, personal loans were given to the defendant; whether the plaintiff was aware of the limitations on SY Lee's authority to take such 'loans' and had extended the loans, or part of it, despite being aware of such limitation and/or of a brewing controversy; whether the defendant had discharged the burden on them to prove that SY Lee did not have authority at all to take the alleged loans and whether the transaction, even if 'invalid' could be ratified or regularised; whether the plaintiff could invoke the assistance of s 71 of the Contracts Act 1950 ('the Act') to recover from the defendant, in any event, the sums advanced by the plaintiff.

Held, dismissing the claim:

(1) Insofar as the plaintiff's allegations and claim in this action was concerned, the onus to discharge the burden of proof remained on the

plaintiff always. Similarly, in the context of the third party proceedings, the burden and onus, no doubt, lay upon the defendant to establish their right to be indemnified by the estate of SY Lee (see para 11).

(2) The plaintiff failed to adduce any evidence at all as to this essential term to establish that the monies remitted or transferred was indeed loans as claimed. There could well be a contract for loan without a written agreement or even a friendly loan, namely, without charge of any interest but the terms or understanding as to repayment was a necessary criteria to constitute the advances as a loan' and fix the point at which any cause of action to recover the advances would accrue to the plaintiff. A mere demand for repayment at some later date was not sufficient to endow the advances the character of being a loan or to give rise to a valid cause of action against the defendant. The material terms as regards repayment, was also to be agreed upon at the time the transfer of monies or advances were made (see paras 16 & 18).

(3) There was merit in the defendant's contention that the defendant had been used as a channel to funnel monies to the NeoMeridian Project which involved the NeoMeridian and Pacific Twin, and not the defendant. It followed therefore that the plaintiffs claim that the advances were for the operational funds of the defendant and for the benefit of the defendant, as now couched, was certainly suspect and remained unproved on a balance of probabilities (see para 29).

(4) Section 71 of the Act could only be invoked if there was no request by the defendant for the loans or the context was such as would be difficult to impute to the persons concerned a relationship actually created by contract. This was the threshold that had to be satisfied by the plaintiff, even before any considerations of the four ingredients were embarked upon. The plaintiff had failed to satisfy the court that there was a loan arrangement in place underlying the three advances he made to the defendant, or that such advances or personal loans were intended for the defendant's operational funds as he claimed to be the case. Section 71 of the Act was not applicable in this factual and pleaded context of this case to assist the plaintiff either to secure the relief sought against the defendant (see paras 36 & 43).

(5) The taking of loans or the securing of financial facilities was undoubtedly within the defendant's powers and objects. Therefore that was not an illegal act. It was trite that non-compliance with provisions of the articles of association were non-compliance with internal management rules of the company only and it was still open for the Board to rectify, ratify or regularise the same, even subsequently (see para 47).

[Bahasa Malaysia summary

Dalam tuntutan ini, plaintif mendakwa bahawa dia telah beberapa kali memberikan pinjaman peribadi kepada defendan. Defendan menafikan

tuduhan-tuduhan tersebut dan menghujah bahawa, sekiranya semua pinjaman dibuat atas permintaan pengarah defendan ('SY Lee'), SY Lee tidak mempunyai kuasa untuk menanggung mana-mana hutang melebihi RM200,000 tanpa kelulusan sebulat suara terlebih dahulu daripada lembaga pengarah defendan ('lembaga'). Defendan seterusnya mendakwa bahawa pinjaman, sekiranya diambil oleh defendan, adalah untuk 'NeoMeridian Sdn Bhd' ('NeoMeridian') dan dana-dana plaintif hanya disalurkan menerusi defendan untuk menjadikan defendan bertanggungan bukannya NeoMeridian. Defendan memohon untuk ditanggung rugi oleh estet SY Lee melalui prosiding pihak ketiga sekiranya penghakiman dimasukkan terhadap defendan dalam tindakan itu. Berkenaan dengan transaksi yang didakwa oleh plaintif, defendan menghujah bahawa SY Lee melanggar kuasa yang dibenarkan dan/atau kewajipannya termasuk kewajipan fidusiari, untuk bertindak secara jujur, suci hati, setia dan/atau bertindak dalam kedudukan bercanggah kepentingan dengan defendan. Isu-isu yang berbangkit dalam tuntutan ini ialah: sama ada plaintif telah melepaskan beban mereka, atas permintaan defendan, pinjaman peribadi diberikan kepada defendan; sama ada plaintif sedar had kuasa SY Lee untuk mengambil 'pinjaman' tersebut dan telah melanjutkan pinjaman, atau sebahagian daripadanya, meskipun sedar mengenai had tersebut dan/atau kontroversi mengenainya; sama ada defendan telah melepaskan beban ke atas mereka untuk membuktikan bahawa SY Lee tidak mempunyai kuasa sama sekali untuk mengambil pinjaman yang didakwa atau sama ada transaksi, meskipun 'tidak sah' boleh disahkan atau diselaraskan; sama ada plaintif boleh menggunakan bantuan s 71 Akta Kontrak 1950 ('Akta') untuk mendapatkan semula daripada defendan, dalam mana-mana keadaan, jumlah-jumlah yang diberikan oleh plaintif.

Diputuskan, menolak tuntutan:

(1) Setakat mana tuduhan-tuduhan plaintif dan tuntutan dalam tindakan ini berkenaan, beban untuk melepaskan beban bukti kekal ke atas plaintif seperti selalunya. Begitu juga, dalam konteks prosiding pihak ketiga, beban dan tanggungjawab, tanpa ragu, terletak ke atas defendan untuk membuktikan hak mereka untuk ditanggung rugi oleh estet SY Lee (lihat perenggan 11).

(2) Plaintif gagal untuk mengemukakan mana-mana keterangan sama sekali mengenai terma penting ini bagi membuktikan bahawa wang yang dihantar atau dipindahkan sememangnya pinjaman seperti yang didakwa. Mungkin juga terdapat kontrak untuk pinjaman tanpa satu perjanjian bertulis atau pinjaman persahabatan iaitu, tanpa apa-apa bayaran faedah tetapi terma-terma atau pemahaman mengenai pembayaran balik merupakan kriteria penting untuk membentuk pendahuluan sebagai pinjaman dan menetapkan titik pada kausa tindakan yang mana untuk mendapatkan pendahuluan yang terakru kepada plaintif. Tuntutan semata-mata untuk bayaran semula pada

tarikh lain tidak mencukupi untuk memberikan karakter pinjaman kepada pendahuluan atau memberikan kausa tindakan sah terhadap defendan. Terma-terma penting berhubung pembayaran semula juga perlu dipersetujui pada masa pemindahan wang atau pendahuluan dibuat (lihat perenggan 16 & 18).

(3) Terdapat merit dalam hujahan defendan bahawa defendan telah digunakan sebagai satu laluan untuk menyalurkan wang kepada Projek NeoMeridian membabitkan NeoMeridian dan Pacific Twin, dan bukannya defendan. Berikutan dengan itu, dakwaan plaintif bahawa pendahuluan tersebut adalah untuk dana operasi defendan dan untuk kemudahan defendan, seperti dinyatakan, adalah disyaki dan kekal tidak dibuktikan atas imbangan kebarangkalian (lihat perenggan 29).

(4) Seksyen 71 Akta hanya boleh digunakan sekiranya tiada permintaan oleh defendan untuk pinjaman-pinjaman atau dalam konteks di mana adalah sukar untuk mengaitkan seseorang berkenaan hubungan yang wujud melalui kontrak. Ini merupakan ambang yang perlu dipenuhi oleh plaintif, sebelum mana-mana pertimbangan mengenai keempat-empat intipati dibuat. Plaintif gagal untuk meyakinkan mahkamah bahawa terdapat aturan pinjaman dibuat berdasarkan ketiga-tiga pendahuluan yang dibuat olehnya kepada defendan, atau pendahuluan tersebut atau pinjaman peribadi bertujuan untuk dana operasi defendan seperti yang didakwa olehnya. Seksyen 71 Akta tidak terpakai dalam fakta dan konteks kes ini untuk membantu plaintif sama ada untuk mendapatkan relief yang diminta terhadap defendan (lihat perenggan 36 & 43).

(5) Pengambilan pinjaman atau mendapatkan kemudahan kewangan tidak disangkal berada dalam kuasa dan tujuan defendan. Oleh itu ia bukan merupakan tindakan yang salah di sisi undang-undang. Didapati bahawa ketidakpatuhan dengan peruntukan perkara-perkara persatuan adalah ketidakpatuhan dengan peraturan-peraturan pengurusan dalaman syarikat sahja dan adalah masih terbuka untuk lembaga untuk memperbetulkan, meratifikasi atau menyelaraskannya, meskipun pada selepas waktu itu (lihat perenggan 47).]

Notes

For cases on friendly loan, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5171–5173.

Cases referred to

Datin Paw Poe Choo v Tai Ah Hin & Anor (KL High Court Suit No D22NCC-790 of 2009), HC (refd)

New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation) [1987] 2 MLJ 57, SC (refd)

Sediperak Sdn Bhd v Baboo Chowdhury [1999] 5 MLJ 229, HC (refd)

Selvaduray v Chinniah [1939] 1 MLJ 253, CA (folld)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (refd)

Legislation referred to

Contracts Act 1950 ss 66, 71, 71 Illustrations
Evidence Act 1950 ss 101, 102

Vijaya Navaratnam (Vijaya Navaratnam) for the plaintiff.
Lee Shih (Skrine) for the defendant.
CK Lim (YC Chuan with him) (Chooi Saw & Lim) for the third parties.

Varghese George J:

[1] I had on 1 June 2012 dismissed the plaintiff's claim brought against the defendant with costs. Since the plaintiff's action had been dismissed, the defendants' claim for indemnity brought against the third party did not call for further adjudication. Nevertheless I proceeded to consider the defendant's third party claim in the event my decision in the principal action was held to be wrong. In respect of the third party proceedings, it was my further conclusion however that the defendant had failed to make out a case to be indemnified by the third party even if the plaintiff had succeeded against the defendant.

BACKGROUND FACTS

[2] The plaintiff was an ex-employee of defendant serving initially as the business development consultant, then as quality manager and subsequently as research and design manager of the defendant from December 2006–January 2011.

[3] The material part of his brief statement of claim (mere six paragraphs) was as follows:

> (4) At Defendant's request, the Plaintiff had on several occasions given the following personal loans to the Defendant -

Date	Particulars	Amount
8.4.2008	By means of TT transaction vide HSBC Bank Philippines in favour of the Defendant Reference TT MKA023993MNY	USD 62,025.00
13.3.2009	By means of TT transaction vide HSBC Bank Philippines in favour of the Defendant Reference TT MKA032535MNY	USD 19,528.00

16.3.2009	By means of personal cheque MBB 000469 in favour of the Defendant.	RM 36,000.00

(5) On 14.12.2010, the Plaintiff wrote to the Defendant seeking the immediate repayment of the said loans amounting to the equivalent of RM306,000/- (i.e. (USD 81,553) + RM36,000/). However, there was no reply from the Defendant.

(6) On 12.1.2011, the Plaintiff again wrote to the Defendant seeking the repayment of the said loans amounting to the equivalent of RM306.000/. Likewise, the Defendant did not take heed of the Plaintiff's said demand.

[4] The defendant (Polar Twin Advance (M) Sdn Bhd) was a joint venture company with the following as its shareholders:

(a) Twin Advance (M) Sdn Bhd;

(b) Polar Electro Europe BV (a Dutch company with place of business in Switzerland), (Polar Electro); and

(c) Finnish Fund for Industrial Co-Operation Ltd (Finnish Fund).

[5] One Mr Lee Siong You (also known as Lee Akau) (also stated as SY Lee in various documents, and hereinafter referred as SY Lee) was at all material time, until his death on 2 January 2010, the managing director of the defendant. There were two other directors on the board of directors (the board) of the defendant and they were nominees of Polar Electro and the Finnish Fund. SY Lee was the representative of Twin Advance (M) Sdn Bhd on the board.

[6] The third party cited in this action was the co-administrators of the estate of SY Lee.

[7] The defendant denied that it had requested for the loans from the plaintiff as alleged, and further pleaded that, if at all the loans were made at the request of SY Lee, SY Lee had no authority to incur any debt which exceeded RM200,000 without the unanimous prior approval of the board.

It was also contended by the defendant that the alleged loan (if at all taken by the defendant) was for 'NeoMeridian Sdn Bhd' (NeoMeridian) and the plaintiff's funds had been merely channeled through the defendant to render the defendant liable instead of NeoMeridian. Further, in any event the alleged 'loan' was of no commercial benefit to the defendant.

[8] By way of the third party proceedings the defendant however sought to be indemnified by the estate of SY Lee should there be a judgment entered against the defendant in the action. The defendant further alleged that in respect of this plaintiff's alleged transaction, SY Lee was in breach of his

permitted authority and/or of his duty including fiduciary duty, to act honestly, in good faith, in fidelity and/or had acted in a position of conflict of interest to that of the defendant.

TRIAL

[9] Three witnesses gave evidence at the trial. The plaintiff gave evidence for himself. Mr Markku Tapani Erikson (currently the managing director of the defendant) testified for the defendant. The third party's case relied solely on the testimony of the defendant's statutory company secretary, who was subpoenaed as a witness.

ISSUE AT THE CLOSE OF TRIAL AND SUBMISSIONS

[10] The issues that called for determination to me at the close of the case were basically:

(a) whether the plaintiff had discharged the burden on them that, at the defendant's request, the plaintiff had given 'personal loans' to the defendant as alleged;

(b) whether the plaintiff was aware of the limitations on SY Lee's authority to take such 'loans' and had extended the loans, or part of it, despite being aware of such limitation and/or of a brewing controversy (amongst shareholders) in respect of the limits of 'such authority' of SY Lee;

(c) whether the defendant had discharged the burden on them to prove that SY Lee did not have authority at all to take the alleged 'loans' and whether the transaction, even if 'invalid' could be ratified or regularised; and

(d) whether, (arising from the closing submission of the plaintiff's counsel), the plaintiff could invoke the assistance of s 71 of the Contracts Act 1950 to recover from defendant, in any event, the sums advanced by the plaintiff.

EVALUATION OF THE EVIDENCE, DISCHARGE OF THE BURDEN OF PROOF

[11] In so far as the plaintiff's allegations and claim in this action was concerned, the onus (in the sense of responsibility to adduce sufficient evidence) to discharge the burden of proof remained on the plaintiff always (sections 101–102 of the Evidence Act 1950). Similarly in the context of the third party proceedings, the burden and onus, no doubt, lay upon the defendant to establish their right to be indemnified by the estate of SY Lee.

[12] In dealing with the question of whether the respective parties here had led sufficient evidence or not to discharge that 'burden of proof on them, the court was best guided by the test laid out by Terrel, Acting CJ in *Selvaduray v Chinniah* [1939] 1 MLJ 253 (CA), in the following instructive words:

> After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial the learned judge has found that the position was exactly even, ie that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. …

(See commentary in *Evidence, Practice and Procedure* (4th Ed) by Augustine Paul (at pp 840–842)

I had this in the forefront of my mind in assessing the evidence that was led before me in this action, particularly whether the evidence led had tilted (on a balance of probabilities) in favour of the plaintiff, and the defendant, as the case was on the claim and the defendant in the third party action, or whether it was wholly inadequate or only even, to accord any judgment in their favour as sought.

THE PLAINTIFF'S CASE AGAINST THE DEFENDANT

[13] In my assessment the plaintiff had before me only proved that three separate payments had been transmitted or paid by the plaintiff and had been received by the defendant in their account for a total or aggregate sums of RM306,000. The remittances or payments were effected on 8 April 2008, 13 March 2009 and 16 March 2009. Subsequently, as it appeared, demands for repayment were made by the plaintiff on 14 December 2010 and by the plaintiff's solicitors on 12 January 2011.

The question, however, still remained at the close of trial whether these payments amounted to 'personal loans' as pleaded and what, if any, were the terms of this 'loan' which as the plaintiff claimed, the defendant was obliged to repay the plaintiff.

[14] In his evidence-in-chief (at Q/A 6; PW1A) the plaintiff described the advances made by him as 'friendly loan' and at Q/A 15–17 of PW1A, the plaintiff asserted further that:

(a) these loans were intended for Defendant's operational fund;

(b) the loans were on a friendly basis with no benefits attached to it;

(c) the loans went toward the operational fund that supported the general expenses (of the Defendant).

Counsel for the plaintiff in her submissions contended that the loans/advances should be ruled to be 'personal or unconditional loans' by the plaintiff to the defendant.

[15] The first point that demanded attention however was the issue, if indeed there was a 'loan arrangement' or a 'loan contract' as alleged between the plaintiff and defendant, as to what were the terms, or understanding reached, as to the 'repayment' of those monies by the defendant. The agreed terms as to repayment, it cannot be disputed was a essential condition to confer any advances or transfer of monies with the status of a 'loan'. In other words, evidence had to be led as to whether the monies transferred on transmitted was to be repaid 'on demand' or on a specific date or was to repaid in some manner, and that these supposed terms had been mutually agreed by the parties as well, when the advances were made.

It is axiomatic that such terms as to 'repayment' was necessary to displace or rule out any subsequent challenge taken to the effect that the transfer of monies was intended to be a 'gift' or it was an 'investment' of sorts, or for some other specific purpose without an obligation to repay. A mere demand for repayment made some time later did not turn such 'advances' into a 'loan' at all.

[16] It was also trite that a cause of action to recover such loan would only arise upon the happening of the agreed event (of repayment) or failure to repay as agreed originally.

Here in this instant case, the plaintiff failed, firstly, in my finding, to adduce any evidence at all as to this essential term (when and how the repayment of the alleged monies advanced was predicated upon) to establish that the monies remitted or transferred was indeed 'loans' as claimed.

[17] This significance of a 'repayment term' as an essential element necessary to constitute a loan contract' was dealt with by Ananthan J (as he then was) in the case (unreported) of *Datin Paw Poe Choo v Tai Ah Hin & Anor* (KL High Court Suit No D22NCC-790 of 2009) and commented upon in the following words:

> A court of law can only determine if there has been a breach of the loan agreement after ascertaining the terms of the loan agreement. It is significant that the statement of claim does not include any reference to the terms of the loan agreement. In my opinion, a cause of action for default in the repayment of the advance must invariably include reference to the repayment date under the loan agreement. The cause of action accruing due upon the failure/refusal of the Defendants to repay the advances on the due date.

Further down in that judgment, it was also stated:

> In other words, the plaintiff's own evidence is that the loan agreement did not include a date for repayment at *the time of the conclusion of the agreement*. Since there was no due date at the time of the alleged advances, the plaintiff's claim for the return of the advances fails for this additional reason.

[18] As is common knowledge, there could well be a 'contract for loan' without a written agreement or even a 'friendly loan', namely, without charge of any 'interest' (for the use of the money) but the terms or understanding as to repayment was, in my assessment, a necessary criteria to constitute the advances as a loan' and fix the point at which any cause of action to recover the advances would accrues to the plaintiff. A mere 'demand' for repayment at some later date (as seem to be postulated by plaintiff's counsel in her submission) was not sufficient to endow the advances the character of being a 'loan' or to give rise to a valid cause of action against the defendant. The material terms as regards repayment, was also to be agreed upon at the time the transfer of monies or advances were made.

[19] As noted above, there was no evidence led by plaintiff on this score at all. This was all the more significant in the context of the pleaded defence of outright denial by the defendant that any 'transfer of monies' by the plaintiff was not a loan to the defendant but a device adopted to channel the funds to 'NeoMeridian', albeit, through the defendant's accounts.

[20] The second point that had to be highlighted was that there was a material contradiction in the plaintiff's claims as to what was the underlying purpose of the so called 'loans' extended by him.

In his testimony before the court (see Q/A 15–17 of PW1A), the plaintiff now acknowledged that he had been aware of the defendant's purpose or intended use of the funds when the alleged 'loan' was taken. The relevant part of his testimony was:

> Yes, to some extent, I was made aware that the loan was intended for defendant's operational funds.

I found this to be inconsistent to what the plaintiff himself had confirmed in the document P1 where the monies advanced to defendant was admittedly denoted by the plaintiff himself as 'Loan to PTA to support NeoMeridian Project'. It could not escape attention here that the plaintiff did not specifically choose to state or qualify on this document (completed about May 2010 as will be elaborated below) that the advances effected by him was for the general funds or operational cash flow needs of the defendant, if that was indeed the case.

[21] The background to P1 was without challenge as follows. P1 was a

corrected version of P6 and it was the plaintiff's testimony that he had initially asked for a statement from the Finance Department of the defendant in respect of monies owed to him (consultancy fees, etc). The Finance Department of the defendant had then forwarded him the table/statement admitted at the trial as P6 titled — Amount outstanding to RIC Topel as at 31 December 2009.

The plaintiff had then corrected the table/statement (P6) and then forwarded the amended form which was admitted at the trial as PI now titled — Amount outstanding to RIC Topel as at 31 December 2009 Rev 2 —14 May 2010.

[22] In P6 (the first in point of time), the advances from the plaintiff (in the second block on the right; the left block was separately in respect of the plaintiff's deferred consultancy fees) was described as 'Loan to PTA for NeoMeridian'.

In P1, the version amended by the plaintiff himself, the description of the advances was corrected and denoted by the plaintiff to read 'Loan to PTA to support NeoMeridian Project'. The advances were still linked to NeoMeridian project as acknowledged and confirmed by the plaintiff himself.

The question that naturally arose then in the circumstances was, why on 14 May 2010 (when the plaintiff revised P6 and allegedly returned P1 to the defendant's Finance Department), the plaintiff did not correct or state that the advances was for 'operational funds' of the defendant or that the monies transmitted to defendant was a 'personal' or 'friendly loan' to the defendant, if that was indeed the fact of the matter.

[23] The plaintiff had therefore in May 2010 (months before he left defendant's service ultimately in January 2011) a definite opportunity to correct the truthful purpose behind his advances, unlinked to the 'NeoMeridian Project' that is, if it was purely a 'personal loan' to or a loan for the 'operational needs' of the defendant, as he now claimed it was.

The plaintiff's attempt in this action to portray the 'advances' as a personal loan to or a loan for the 'operational funds' of the defendant, was clearly, in my assessment, an afterthought to make the defendant directly liable for its 'repayment', independently of any related implications surrounding the NeoMeridian project as such.

[24] At this juncture, it is material to comment on the NeoMeridian project itself. The evidence led before the court disclosed that there was a memorandum of understanding ('MOU') entered into at about June 2007 between the defendant and one NeoMeridian Sdn Bhd. The plaintiff admitted that he was made aware of this by SY Lee and he did or was expected to follow-up with the technical aspects of the MOU for the defendant. (The defendant was to become the contract manager for NeoMeridian of all structured ASIC (SA) System on a Chip ('SOC') based products in a business

venture.) As per the MOU, NeoMeridian was desirous for the defendant to be their business partner to meet purchase orders to be received and the defendant in turn was desirous of entering into a long term manufacturing agreement with NeoMeridian, amongst other terms.

[25] The plaintiff also admitted that the envisaged long term manufacturing agreement between the defendant and NeoMeridian was never concluded but he was aware that substantial advances were made by the defendant to NeoMeridian or towards this project but not of the exact amount of the sums advanced.

[26] It was also in evidence that one Pacific Twin Advance Sdn Bhd had entered into contract manufacturing agreement (16 August 2007) (D5) with NeoMeridaian Sdn Bhd (to manufacture NeoVantage range of products) and the plaintiff had a hand in this as well. Further it was the plaintiff himself who forwarded the document concerned (agreement) to the representative of NeoMeridian (p 227; CABD2; the plaintiff's e-mail).

It was also before the court that the shareholders of Pacific Twin Advance Sdn Bhd (incorporated 26 December 2006) were SY Lee and one other (pp 58–64; CABD1) and as was also obvious from the contract manufacturing agreement (between Pacific Twin and NeoMeridian above), the address of Pacific Twin (stated at p 288) was the same as that of the premises of the defendant itself.

[27] Most importantly, the plaintiff admitted he was aware of this rather suspicious side arrangement between another of SY Lee's company (using the defendant's address) with NeoMeridian (despite the MOU between the defendant and NeoMeridian). When challenged on his knowledge and involvement in this somewhat dubious arrangement (Polar Twin and NeoMeridian), the only explanation that the plaintiff could offer was that:

> I considered *Pacific* Twin Advance and the Defendant to be synonymous and
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> *Pacific* Twin and *Polar* Twin were in my perspective - synonymous.

I did not find this explanation of the plaintiff to be honest or even remotely convincing.

[28] There was no doubt in my mind, and as contended for the defendant, that the benefit of the only concluded contract manufacturing agreement (irrespective of the specific product manufactured), was Pacific Twin and not the defendant (Polar Twin). The plaintiff at all material times had full knowledge of the involvement of Pacific Twin in the NeoMeridian project (concluded manufacturing agreement —16 August 2007). The plaintiff also admitted to his own involvement in the technical aspect under this concluded agreement between Pacific Twin and NeoMeridian.

Save for the MOU which remained executory only, it was evident that the defendant, (Polar Twin) was not involved in the NeoMeridian project and this was known to and acknowledged by the plaintiff.

Hence, it begged an answer as to what the plaintiff meant when in May 2010 in P1, the plaintiff denoted his advances as 'Loan to PTA to support NeoMeridian Project'. The abbreviation 'PTA' could well have also referred to Pacific Twin Advance and not the defendant (Polar Twin Advance).

[29] Premised on the aforesaid, it was my further conclusion that there was merit in the defendant's contention (see statement of defence), that the defendant had been used as a channel to funnel monies to the NeoMeridian project which involved the NeoMeridian and Pacific Twin, and not the defendant. It followed therefore that the plaintiff's claim that the advances were for the 'operational funds' of the defendant and for the benefit of the defendant, as now couched, was certainly suspect and remained unproved on a balance of probabilities.

[30] The third point that had to be given due regard was that the plaintiff's advances that were made on 13 March 2009 and 16 March 2009 were effected after a controversy had surfaced as to the authority (or lack of it) of SY Lee to enter into contracts exceeding in value of RM200,000 (included there was the employment terms and remuneration of the plaintiff himself). The issue had been raised in a letter by Messrs Skrine of 14 January 2009 (D2) to the defendant and SY Lee. The plaintiff under cross-examination conceded that he was actively involved in drafting the reply (D3) and in liaising with Messrs Ghazi and Lim, the defendant's lawyers on this subject.

A prudent person being cognisant of this potential, if not simmering controversy surrounding SY Lee's limit of authority, would have been expected to be circumspect not to make any further advances (which in aggregate would exceed RM200,000) to the defendant, allegedly on the request of SY Lee. The two further payments (13 March 2009/ 16 March 2009) were effected in disregard of this doubt surrounding SY Lee's limit of authority and at the risk of such taking of the 'loan' (for the defendant as alleged) was likely to be struck down ultimately as 'invalid'.

[31] In the result, it was my conclusion for the reasons discussed above that the plaintiff had only established the fact that certain sums had been transmitted or paid to the defendant. The plaintiff had failed to prove that such 'advances' made were 'personal loan' or 'friendly loan' for the operational funds of the defendant as pleaded or as testified in court.

There was no convincing evidence or any reliable neutral corroboration of the plaintiff's claim in any event. What remained was merely the plaintiff's assertions to that effect.

SECTION 71 OF THE CONTRACTS ACT 1950

[32] Counsel for the plaintiff in her submissions at the close of the trial argued that the plaintiff was entitled, additionally she says, to the relief sought against the defendant in the action, under the enabling provisions of s 71 of the Contracts Act 1950 ('s 71').

While the Contracts Act 1950 and its provisions might be 'the law' and need not be pleaded specifically as such, I was of the opinion that the circumstances or facts that are relevant and, which according to the plaintiff would entitle the plaintiff to invoke the assistance of s 71, ought to have been pleaded in the statement of claim in the first place.

The statement of claim of the plaintiff in this action did not advert to or condescend with relevant facts or particulars to ground any order for 'restitution' under s 71 to be granted by the court to the plaintiff.

[33] Section 71, embodied the equitable principle of restitution and prevention of undue enrichment. This position in law, as has been affirmed in various decisions of our courts, enabled a person who actually supplied goods or rendered some service, not intending to do so gratuitously, to claim for compensation from the person who enjoyed benefit of the supply made or of the services rendered (this included monies remitted, albeit wrongfully) (see the addendum comments of Abdul Malik Ishak J (as he then was) in *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229. The Privy Council in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118 had laid out four essential ingredients, in any case, to be satisfied if such relief was to be granted under s 71. To succeed and obtain any relief under that provision the plaintiff had to prove that the act or delivery, was:

(a) lawful;

(b) done for another person or individual;

(c) done with a non-gratuitous intent; and

(d) the other party enjoyed the benefit of the act or delivery.

[34] Section 71 (and the Illustrations) made it clear that a right to 'restitution' would only come into operation where something was done or delivered by A to B, not at the request of B, and B following that, went on to derive benefit from that act. In such a context, B was bound to make compensation or restore to A for the benefit derived. As such s 71 was of no help where there was a 'request' for that 'act or supply' in the first place; a request for such act or supply obviously would bring the resultant relationship into the realm of a contractual arrangement.

This threshold to be crossed — that is, the act or delivery was not at the request

of the other party, was explained by Ananthan J (as he then was) in the earlier cited case of Datin Pow Poe Choo, where it was noted:

> With respect, I disagree. The fallacy in the submission of counsel is that a claim cannot fall within s 71 if the doing of the act was at the request of the other party. Pollock and Mulla commenting on the equivalent s 70 of the Indian Contract Act have this to say in their 13th edition:
>
> > Section 70 contemplates a case where, initially, at the time of the doing of the act or the delivery of the thing, there is no 'proposal' or 'promise' as defined in s 2, and therefore, no agreement. The obligation to make compensation to the person doing the act or, delivering the thing nevertheless arises out of the fact that the person for whom the act was done or to whom the thing was delivered, accepted and enjoyed its benefits, although there was no request for the act or the thing on his part. The section clearly contemplates a case where an act has been done or a thing delivered without request, but not gratuitously.

[35] The High Court in the case of *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1987] 2 MLJ 57 at p 65 observed as follows:

> According to Pollock and Mulla on the *Indian Contract and Specific Relief Acts* (9th Ed), at p 497 there is good authority for saying that s 70 of (the Indian) Contract Act was framed in the present form with a view to avoid niceties of English law on the subject of quasi-contract. According to the learned authors of the book, *the section is not founded on contract but embodies the equitable principle of restitution and unjust enrichment*. According to them the principle of unjust enrichment falls under section 69 and 70 (ss 70–71 of our Contracts Act), but these sections are wider in scope than the doctrine as applied in England and go far beyond it. And according to them 'the terms of (s 71 of our Contracts Act) are unquestionably wide but applied with discretion they enable the courts to do substantial justice in cases *where it would be difficult to impute to the persons concerned relation actually created by contract* (see *Suchard v Belaram* quoted with approval in *State of West Bengal v BK Mondal & Sons.* (Emphasis added.)

The High Court's pronouncement of the law as quoted above was subsequently affirmed by the Supreme Court in the same case.

[36] It was clear therefore that, in law, s 71 could only be invoked, in the first place, if there was no request by the defendant for the 'loans' or the context was such as would be difficult to impute to the persons concerned a relationship actually created by contract. This was the threshold that had to be satisfied by the plaintiff, even before any considerations of the four ingredients were embarked upon.

[37] In this instant action, on the pleadings itself, the plaintiff alleged that the 'loans' were made at the reguest of the defendant and in evidence before the

court, the plaintiff went on to testify that it was effected at the request of SY Lee, the managing director of the defendant.

It was my conclusion therefore that the plaintiff had, on that ground alone, put himself out of any relief pursuant to s 71, as now attempted to be pursued. It was the sole basis of the plaintiff's case that the monies were advanced at the request or behest of the defendant to assist the operational funds of the defendant.

It must also be noted here that this action was not premised upon a 'money had and received' situation, in which case, if at all, s 66 of the Contracts Act 1950 would have been the relevant provision (where the agreement has been discovered to be void or when the contract becomes void) for any relief to be granted; the plaintiff's case before me in any event was not to declare the 'contract' (of borrowing between the plaintiff and defendant) to be void and for consequent restoration of monies to the plaintiff.

[38] If on the other hand this 'threshold', identified above, did not apply, the question still remained whether all the four ingredients to allow any relief there under, had been met. It was my opinion that conditions (a) and (d) was in the context of the evidence before me, not shown to have been satisfied in any event.

[39] For condition or ingredient (d) (the other party, the defendant, enjoyed the benefit of the act or delivery) to be satisfied there ought to have been placed before the court sufficient proof that it was the defendant who benefitted from the advances effected by the plaintiff.

This, as elaborated and discussed by me earlier in these grounds of decision, had not been established by the plaintiff at all. The plaintiff's amended confirmation in P1 was that the advances were to 'support the NeoMeridian Project', and further all indications pointed to the 'NeoMeridian project' referred to as that between Pacific Twin and NeoMeridian; there was therefore a total absence of evidence that the defendant (Polar Twin) benefited from the monies advanced by the plaintiff.

[40] As regards condition (a) (such act or delivery must be lawful) which had also to be satisfied (if s 71 was to aid the plaintiff's case for 'restitution' of funds), as also discussed earlier, the plaintiff had been put to notice of serious irregularities and possible breach of SY Lee's limit of authority arising from the lack of unanimous broad approval in respect of various acts or transactions entered into by SY Lee (the letter from Skrine, article 85(d) and (g) of the articles of association and cl 9.2 of the joint venture agreement). The plaintiff had despite this knowledge (at least constructive, if not positive notice) still extended the final two payments. The plaintiff well knew that such advances

(to constitute an obligation on the defendant to repay) were tainted and not lawful or was likely to be so construed.

[41] The plaintiff obviously could not therefore in such circumstances too avail of any recovery pursuant to s 71, of the monies that he transmitted or transferred to the defendant. The plaintiff's attempt now to bring the claim under this guise was not only misconceived as discussed earlier, but tantamount to a desperate 'clutching of straws' to offset his loss.

[42] Overall, the plaintiff did not further impress me as a forthright witness on the stand. It was only under cross-examination that the true circumstances and what the 'NeoMeridian' project was all about was disclosed or forthcoming from the plaintiff. To me, to maintain that Polar Twin and Pacific Twin were 'synonymous' was as if the plaintiff was an 'unschooled' person, not the business development consultant he claimed to be. It was so basic a fact that Pacific Twin and Polar Twin were two different and separate legal entities and the plaintiff had his hand in both the ventures, fair or foul irrespective.

[43] In the result, the conclusion I reached on a critical analysis of the evidence and submission before me was that the plaintiff had failed to satisfy the court that there was a 'loan' arrangement in place underlying the three advances he made to the defendant, or that such 'advances' or 'personal loans' were intended for the defendant's operational funds as he claimed to be the case. Section 71 was not applicable in this factual and pleaded context of this case to assist the plaintiff either to secure the relief sought against the defendant.

THE DEFENDANT v THIRD PARTY

[44] Although it was not necessary, in the light of my conclusions above, to make a finding on this part of proceedings, it was my conclusion after having given due consideration to the testimony of DW1 (evidence-in-chief and under cross-examination) and of TPW1, that the defendant had not made out a case, on a balance of probabilities, for the court to hold the estate of SY Lee be held liable to indemnify the defendant, that is, even if the defendant had been held or ordered to meet the plaintiff's claim.

[45] Firstly, it is pertinent to bear in mind that the question for consideration here was not SY Lee's conduct in so far as the 'NeoMeridian' project or of SY Lee's interest in 'Pacific Twin' or the involvement of 'Pacific Twin' in any project with NeoMeridian. These aspects of what had transpired where the plaintiff, SY Lee and NeoMeridian Sdn Bhd were active players, might well constitute

the basis of some other wider remedial action by the defendant against SY Lee perhaps but had to be isolated for the limited issue as stated below for our present consideration.

[46] What had to be focused upon in this third party proceedings for indemnity by the defendant was purely the issue and circumstances surrounding SY Lee's act of taking a 'loan' from the plaintiff, the aggregate value of which exceeded RM200,000. Article 85 of the defendant's article of association did require unanimous board approval (note: not stated to be prior board approval in any case) if the defendant was to enter into a 'debt or financial liability' (article 85(d)) or into any 'transaction outside the ordinary course of business with shareholders, directors or employees' (article 85(g)) exceeding RM200,000 in the aggregate value.

To me, there might have been no formal board approval obtained by SY Lee for the taking of the 'loan' from the plaintiff, but the further and more significant question was whether this requirement was in practice an absolute requirement at all times as far as the defendant was concerned. Even assuming that those provisions of the defendant's articles had not been complied with the question yet to be asked was whether such seeming 'breach' was wholly incurable or whether in other words it could be ratified or regularised subsequently. This was the ultimate question in any case for consideration in so far as the defendant's third party claim against SY Lee was concerned.

[47] The taking of loans or the securing of financial facilities was undoubtedly within the defendant's powers and objects. Therefore that was not an illegal act. It was trite that non-compliance with provisions of the articles of association were non-compliance with internal management rules of the company only and it was still open for the board to rectify, ratify or regularise the same, even subsequently.

[48] In this regard the evidence of TPW1 was that there had been various instances when liabilities had been incurred by SY Lee or for the defendant in excess of the bar of RM200,000 and the entry into those obligations had been subsequently put right or ratified by the board. The obtaining of prior board approval was not the practice of the defendant in all cases.

DW1 under cross-examination by counsel for the third party was shown various transactions that had been entered into by or for the defendant exceeding in value of RM200,000 which had no specific board approval. DW1 agreed that the documents produced did make reference to such expenditures and transactions incurring liabilities in excess of RM200,000 but insisted that such cases were within the context of a prior approved budget or financial plan for the year of the defendant. DW1 was however unable to produce the relevant documents to back up that part of his claim. In any case such an unsupported assertion by DW1 contradicted TWP1 's testimony.

[49] I accepted TWP1 evidence that it was within the defendant's normal practice to have matters that required board's unanimous approval approved or ratified even subsequently, often at the stage of audit of defendant's accounts only. TWP1 was a neutral and disinterested witness. The taking of loans for the defendant company was not per se 'ultra vires' the defendant's object either. As such, I was of the view, that even if SY Lee had breached his mandate in this case by entering into a transaction which implicated an obligation in excess of his limit of authority of RM200,000, such impugned act was not an act that could not be regularised or ratified later by the defendant's board. It was not disproved that in all likelihood such ratification would follow.

[50] It was also in evidence that the late SY Lee as the managing director had been allowed much latitude in the running of the defendant's business by the foreign shareholders since the inception of the joint venture.

There was no evidence adduced either to indicate that SY Lee had personally benefitted from the 'loan' taken from the plaintiff (if indeed it was a 'loan') or that SY Lee was not acting in good faith (in taking the loan) apart from the suggestion it was linked to Pacific Twin's involvement with NeoMeridian. This as noted above was altogether another matter not within the context of the issue in the instant third party proceedings.

It was also pointed out that cl 9.2 of the JVA between the shareholders of the defendant had similar or parallel limits imposed on SY Lee in his duties as the managing director. Suffice to state here that any relief or redress under those contractual obligation was a matter inter se between the shareholders and was in any case irrelevant for the reasons already adverted to above.

[51] I therefore found no compelling reason to hold that the estate of SY Lee should be made liable if at all the plaintiff had succeeded on this claim in this action against the defendant. The answer to the ultimate question was that any breach or act in excess of authority by SY Lee, as supported by previous practice of the defendant, could have been subsequently ratified or regularised by the board in any event.

[52] For the reasons above. I proceeded to dismiss the plaintiff's claim against the defendant and further held that even if the plaintiff had succeeded in holding the defendant liable, the defendant had not in any event made out a case for judgment in the defendant's favour against the third party.

Claim dismissed.

Reported by Afiq Mohamad Noor